failed to fulfil the terms stipulated (see paragraphs 5, 6, 7, 8 and 9 of the affidavit of Jong Foh Jan affirmed on 23 July 1991). In my view there was nothing else the 3rd defendant could have done to be fair to the plaintiff in the circumstances. It is to be noted that s. 104 is also a preventive section and its purpose would be defeated if nothing could be done until and unless the affected party has been given all the hearings or representations as the plaintiff seems to suggest.

For the foregoing reasons in my judgment the exercise of statutory discretion by the 3rd defendant was reasonable, independent of the decision of the 2nd defendant and in compliance with the elementary rules off natural justice and/or fairness. Accordingly his actions are theref'ore not *ultra vires*, null and void.

D. Conclusion:

In view of the conclusions I have reached on the issues raised by the plaintiff and as declaration is a discretionary remedy and in view of s. 104(5) of the Act I therefore refuse to grant the declarations prayed for. Accordingly, the question of assessment of damages does not therefore arise. This action is dismissed with costs to the defendants to be taxed.

TAI CHOI YU (SUING AS ACQUIRER)

v.

THE GOVERNMENT OF MALAYSIA & 2 ORS.

HIGH COURT, MIRI
TUAN RICHARD MALANJUM JC
[CIVIL SUIT NO. 2 OF 1992]
12 APRIL 1993

REVENUE LAW: Real property gains tax - Real Property Gains Tax Act 1976 - Assessment - Judgment obtained under O. 26A Subordinate Courts Rules 1980 - Appeal by plaintiff pending - Action commenced by plaintiff seeking declarations that assessment null and void and damages - Conditional appearance entered - O. 12 r. 7 RHC 1980 - Application by defendants to strike out writ and statement of claim - Application by plaintiff to set aside defendants' application; plaintiff's application - Defendants' application made after period specified in O. 12 r. 7 - Whether leave for extension obtained - No objection from plaintiff - Effect - Defendants' amended application - Whether defendants entitled to proceed also under O. 18 r. 19 & O. 92 r. 4 RHC 1980 - Costs - Amendment to defendants' application after plaintiff's application filed - Effect; defendants application - reservice of writ - Costs - Whether defendants entitled to costs - Issue of improper party - Whether properly before the Court - Action commenced by plaintiff - relief claimed and issues raised in statement of claim - Whether Court had jurisdiction - Issues raised in action - Whether connected with assessment of gains tax - Section 102(9) Income Tax Act 1967 - Meaning of appeal.

CIVIL PRACTICE & PROCEDURE: Application of defendants to set aside writ and statement of claim - Improper joining of party - Whether issue before Court - Entry of conditional appearance under O. 12 r. 7 RHC 1980 - Whether defendants entitled to make an application to set aside also under O. 18 r. 19 & O. 92 r. 4; jurisdiction - Grievance regarding assessment of capital gains tax - Whether the Court the proper forum - Court judgment already obtained and appeal pending - Whether plea of res judicata applicable - Action for declaratory relief and damages - Whether Court had jurisdiction over issues raised in action.

The plaintiff acquired a parcel of land in Miri in 1983, but no notification was given to the 2nd defendant of the acquisition as required under s. 12(1)(a) of the Real Property Gains Tax Act 1976 ('the 1976 Act'). On receipt of information pertaining to the transaction,

and after communications between the relevant parties, a notice of assessment was issued to the plaintiff on 21 January 1989. The defendants brought an action against the plaintiff for the gains tax assessed on the transaction and obtained a judgment on 22 January 1992 pursuant to O. 26A of the Subordinate Courts Rules 1980.

An appeal was filed against the judgment, but pending hearing, the plaintiff filed an action. The relief claimed included declarations on a number of grounds, that certain acts of the defendants were *ultra vires* and void as being contrary to established principles of natural justice and fairness, that they were in violation of Article 8 of the Malaysian Constitution and in excess of jurisdiction. General and special damages were claimed for loss caused by the negligence and/or breach of statutory duties by the defendants, and general and exemplary damages for fraud and oppressive, arbitrary and unconstitutional acts of the defendants.

The defendants entered conditional appearance on 13 February 1992, then applied by way of amended summons to have the writ and statement of claim set aside on a number of grounds. The application was made after the expiry of 14 days speicified under O. 12 r. 7 of the Rules of the High Court 1980 ('RHC 1980'). It was submitted in the application that the Court had no jurisdiction to entertain the action of the plaintiff as the proper forum for such a grievance should be the Special Commissioner.

The plaintiff, on his part, applied to have the defendants' application struck out on the ground that under O. 12 r. 7 RHC 1980, following entry of conditional appearance, the defendants were only entitled to set aside the writ for irregularities in form of service thereof or for want of jurisdiction of the Court.

Held:

A. Plaintiff's application (The parties agreed to have this application dealt with first.)

[1] Though no prayer for extension of the period was made in the application for leave to enter conditional appearance under O. 12 r. 7, in the circumstances of the case the benefit of doubt should be given to the defendants that an order for extension was made. Moreover, there was no objection from the plaintiff.

Ordinarily the orders in RHC 1980 are meant to be observed strictly, Thus, litigants and their Counsel should not adopt a lax attitude and invoke O. 2 or O. 3 of RHC at their whims and fancies. Unless they come with reasonable explanations those orders should not be made available easily.

[2] There was no merit in the plaintiff's application. Upon amendments in chambers, the defendants were proceeding not only under O. 12 r. 7 but also O. 18 r. 19 and O. 92 r. 4 of RHC 1980. The defendants were entitled to take such an action even though they had entered conditional appearance only.

[Application dismissed. No order as to costs as the application was filed before the application of the defendants to set aside the action was amended].

B. Defendant's application

[1] On the issue of irregularities in service of the writ of summons, it did not have any more merit as the parties had agreed that the writ had been reserved on the defendants. Furthermore, since there was nothing shown that the defendants were put to further costs or inconvenience by the reservice, there was no basis to grant any costs to the defendants.

[2] As for the issue on improper party, the issue was not properly before the Court.

C. Contentions of the parties

[1] There was no dispute to be found in paragraphs 1 to 3 of the statement of claim, as these paragraphs were basically introductory.

[2] The Court had no jurisdiction to entertain paragraphs 4 to 15.1.

a. These paragraphs shoud have been dealt with before the Special Commissioners as provided under the 1976 Act and the Income Tax Act 1967 ("the 1967 Act').
b. Further, as the issue raised in them was already a subject of a court judgment and pending appeal, the plea of *res judicata* would also succeed.

[3] The Court had jurisdiction to hear paragraphs 15.2 to 21 of the statement of claim.

a. The prayers of the action appeared to be substantially within the ambit of those paragraphs.

b. The paragraphs raised issues regarding the discretionary powers of the defendants and Article 8 of the Federal Constitution, of excess of jurisdiction, breach of rules of natural justice and fairness, of fraud and of oppressive, arbitrary and unconstitutional act on the part of defendants. These issues involved statutory interpretation, questions of law and plain claims for fraud and negligence. The issues were triable issues and not obviously unsustainable. A full hearing was therefore necessary before the Court could determine on the scope of the statutory and constitutional provisions raised in the statement of claim.

There is no provision in the 1976 Act or the 1967 Act which deprives the civil court of jurisdiction when the question of statutory interpretation or plain question of law arises. Section 102(9) of the 1967 Act provides 'appeal' to mean only an appeal against an assessment. In the present case, the issues raised were not directly, plainly and obviously connected to the question of being dissatisfied with the assessment of the gains tax.

The inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power which should be exercised with utmost caution. Furthermore, difficult questions of law which called for detailed argument and mature considerations should be dealt with at the trial.

[Paragraphs 4 to 15.1 ordered to be struck out. Only one-half of the taxed costs to be awarded to the defendants].

Cases referred to:
The Ocean Jade [1991] 2 MLJ 385 ***(cit)***
Tye Chwee Hoon v. Cayman Commodities (M) Sdn. Bhd. & Anor. [1989] 2 MLJ 317/[1989] 2 CLJ 518 ***(refd)***
Tio Chee Hing & Ors. v. Government of Sabah [1981] 1 MLJ 207 ***(cit)***
Arumugam Pillai v. Government of Malaysia [1980] 2 MLJ 283 at p. 287 H ***(foll)***
Othman & Anor. v. Mek [1971] 2 MLJ 214 ***(cit)***
Lian Ann Lorry Transport & Forwarding Sdn. Bhd. v. Govindasamy [1982] 2 MLJ 232 ***(foll)***
C.C. Ng & Bros. Sdn. Bhd. v. Government of State of Pahang [1985] 1 MLJ 347/[1985] 1 CLJ 235 ***(foll)***
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23 at p. 23 G ***(foll)***
Lee Nyan Choi v. Voon Noon [1979] 2 MLJ 28 ***(foll)***
Drummond-Jackson v. British Medical Association [1970] 1 All ER 1094 ***(refd)***

Legislation referred to:
Employees' Social Security Act 1969, s. 31
Federal Constitution, Article 8
Income Tax Act 1967, s. 102(9)
Real Property Gains Tax Act 1976, s. 12(1)(a)
Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19, O. 92 r. 4
Subordinate Courts Rules 1980, O. 26A

For the plaintiff - Tai Choi Yu; M/s. Tai Choi Yu & Co.
For the defendants - Bazain Idris, SFC (Nik Suhaimi Bin Nik Sulaiman, FC with him)

JUDGMENT

Richard Malanjum JC:

A. *The undisputed facts*

The undisputed facts as gathered from the affidavits filed herein by the parties are as follows:

The plaintiff acquired a parcel of land described as Miri Lease No. 4445 on 9 November 1983 from the disposer Clement Tai Van Yu. There was no notification to the second defendant of the acquisition by the plaintiff as required under s. 12(1)(a) of the Real Property Gains Tax Act 1976 (hereinafter called "the 1976 Act"). On receipt of information pertaining to the transaction and the subsequent communications between the second defendant and the plaintiff a Notice of Assessment was issued to the plaintiff by the second defendant on 21 January 1989. Thereafter further communications took place between the plaintiff and the second defendant which was represented by the third defendant. The affair culminated in an action taken by the defendants against the plaintiff for the gains tax assessed on the transaction and a judgment was obtained against the plaintiff on 22 January 1992 pursuant to O. 26A of the Subordinate Courts Rules 1980. The plaintiff has appealed against the judgment and it is pending for hearing. In the interim the plaintiff filed this action.

B. *The Applications:*

There are two applications before me each by the defendants and the plaintiff respectively.

The defendants' application is by way of an amended summons in chambers redated 14 August 1992 seeking for the following orders, namely:

(i) The Writ dated 18 January 1992 and the Statement of Claim dated 16 January 1992 be set aside
(ii) Costs of the application be given to the defendants

The grounds of the application are given as follows:

(1) The Writ and the statement of claim disclosed no reasonable cause of action
(2) It was frivolous and vexatious
(3) It was an abuse of the process of the Courts

(4) and further grounds as contained in the affidavit filed herein marked "SH" affirmed on 11 March 1992.

(a) Improper party
(b) No Jurisdiction
(c) The Statement of claim was *Res Judicata*
(d) To struck (*sic*) out the statement of claim

(5) Irregularities in service of the Writ

(The **bold** portions are those incorporated upon amendment). The original summons in chambers of the defendants is dated 12 March 1992.

B. (i) *The plaintiff's application:*

In a pre-emptive move the plaintiff filed by way of a Notice of Motion an application praying that the application of the defendants be struck out on the ground 'that the said application following entry of conditional appearance under O. 12 r. 7 of the Rules of the High Court 1980 only entitles the defendants to set aside the writ for irregularities in form or service thereof or for want of jurisdiction of the court'. The defendants in fact entered a conditional appearance on 13 February 1991.

At the commencement of the hearing the parties agreed to have the application of the plaintiff heard first and in chambers. I shall therefore deal with the plaintiff's application first.

In a nutshell, the plaintiff is in fact making a preliminary objection to the defendants' application on the basis that O. 12 r. 7 of the Rules of the High Court 1980 (hereinafter called "Rules of the High Court 1980") has a limited capacity and does not include what the defendants are seeking for.

Order 12 r. 7 of Rules of the High Court 1980 reads:

(1) A defendant to an action may at any time before entering an appearance therein, or, **if he has entered a conditional appearance, within 14 days after entering the appearance,** apply to the Court for **an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him** or discharging any order giving leave to serve the notice on him out of the jurisdiction.
(2) An application under this rule must be made by summons.
(emphasis added).

I note that the application of the defendants was made after the expiry of 14 days as required under O. 12 r. 7. But there was no objection coming from the plaintiff who appeared in person being an advocate of the High Court in Borneo. Perhaps it is due to the purported application by the defendants seeking for extension of 30 days to file their application when they first sought leave to file a conditional appearance. But on perusal of the *ex-parte* application for leave to enter a conditional appearance dated 13 February 1992 I find no prayer for the extension of the period. It is only in paragraph 5 of the supporting affidavit of Encik Nik Suhaimi bin Nik Sulaiman affirmed on 12 February 1992 that there is a reference for a request for an extension of the period. Yet in paragraph 6 of the same affidavit only the prayer stated in the *ex-parte* summons in chambers was prayed for and I find no order being extracted to indicate what was granted by the learned Senior Assistant Registrar when he wrote "OIT" on the summons itself. Anyway as there was a request made albeit in the supporting affidavit and it is not clear what the learned Senior Assistant Registrar granted I give the benefit of doubt to the defendants that such an order was made. Moreover there was no objection from the plaintiff. Ordinarily in my view the Orders in Rules of the High Court 1980 are meant to be observed strictly. (See: '*The Ocean Jade* ' [1991] 2 MLJ 385). Thus, litigants and

their Counsel should not adopt a lax attitude and to invoke O. 2 or O. 3 of Rules of the High Court 1980 at their whims and fancies. Unless they come with reasonable explanations those Orders in my view should not be made available easily.

Coming back to O. 12 r. 7 it is obvious that the order that may be applied by an applicant under this provision is for an order either to set aside the writ, the service of the writ or notice of the writ or to declare that the writ or notice has not been duly served on him. The grounds for making such an application may vary from case to case.

In the present case however, upon amendments of the summons in chambers the defendants are not only going under O. 12 r. 7 but also under O. 18 r. 19 and O. 92 r. 4 of Rules of the High Court 1980. In my view the defendants are entitled to take such a course of action even though they have only entered a conditional appearance. In the case of *Tye Chwee Hoon v. Cayman Commodities (M) Sdn. Bhd. & Anor.* [1989] 2 MLJ 317 his Lordship Mohamad Dzaiddin J. (as he then was) expressed a similar view at p. 318 C (right):

> As for the second point of objection, there was no necessity to file the defence after filing a conditional appearance and when there is a pending action by the second defendant to strike out the plaintiff's writ and the statement of claim.

[See also: *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207 where the striking out of the writ of summons and the statement of claim was allowed by the High Court and affirmed by the then Federal Court even before the defendant entered an appearance].

Accordingly, I find no merit in the application of the plaintiff and I hereby dismiss it. I make no order as to costs as indeed it was filed before the application of the defendants was amended.

B. (ii) *The Defendants' application*

I now deal with the application of the defendants.

On the issue of irregularities in service of the of Summons I do not think it has any more merit as the parties agreed that the Writ has been reserved on the defendants. The learned Senior Federal Counsel submitted that the defendants should be awarded costs as the reservice was the consequence of their objections. To that submission I would only say that since there was nothing shown that the defendants were put to further costs or inconvenience by the reservice there is no basis to grant any costs to the defendants.

As for the issue on improper party I do not think such an issue is properly before this Court. It is only the 3rd defendant that is claiming to have been improperly joined. If he feels strongly about it he should proceed by way of another application under a different provision of Rules of the High Court 1980.

C. *The Contentions of the parties:*

I shall now deal together the other grounds of the application of the defendants

During the hearing I note that the emphasis of the learned Senior Federal Counsel was on the issue of jurisdiction. He submitted that this Court has no jurisdiction to entertain the action of the plaintiff as the proper forum for such a grievance, being dissatisfied with the assessment made, should be the Special Commissioner.

Perhaps at this juncture it may be appropriate and for convenience that the relief sought are reproduced.

The relief sought are:

1. A Declaration that the 1st defendant's claim for Real Property Gains tax of RM9,900 against the plaintiff is *ultra vires* and null and void as being contrary to established principles of natural justice and fairness;
2. A Declaration that the rejection of the Clement Tai Van Yu's (disposer) application for exemption under s. 8 of the Real Property Gains Tax Act 1976 was *ultra vires* and null and void as being contrary to established principles of natural justice and fairness and in violation of Article 8 of the Malaysian Constitution;
3. A Declaration that the rejection of the plaintiff's appeal to the Special Commissioners of Income Tax by the 2nd and 3rd defendants is *ultra vires* and null and void as being contrary to natural justice and fairness and also in excess of jurisdiction.
4. General and Special Damages for consequential loss or damage caused by the

negligence and/or breach of statutory duties of and/or by the 3rd defendant as servant and agent of the 1st and 2nd defendants during and in the course of his employment;
5. General and exemplary damages for fraud and oppressive, arbitrary and unconstitutional acts of the 2nd and 3rd defendants;
6. Interest thereon at such rate and for such period as the Court deems just;
7. Such further and other relief as may be just; and
8. Costs occasioned by and incidental hereto.

As for the contents of the statement of claim I have examined them and my observations are as follows:

(a) for paragraphs 1 to 3 they are basically introductory and I find no dispute in them;
(b) for paragraphs 4 to 12 they are very much of evidential value related to the issue of the assessment made and the dissatisfaction thereof as indicated in paragraphs 13 to 15.1;
(c) paragraphs 15.2 and 15.3 deals with the discretionary powers of the defendants and Article 8 of the Federal Constitution, the existence of such discretionary powers and their limitations. There is a question of interpretation of statutory and constitutional provisions involved;
(d) paragraph 16 and the particulars thereof is on the question of excess of jurisdiction on the part of the defendants. This is also a question of statutory interpretation on to the limit of the powers of the 2nd and 3rd defendants;
(e) paragraphs 17.1 and 17.2 are over a breach of the rules of natural justice and fairness on the part of the defendants. This is a question of law;
(f) as for paragraph 18 and the particulars thereof it deals with the averment of fraud and oppressive arbitrary and unconstitutional acts of the defendants. This is also a question of law and limit of powers of the defendants in relation to the relevant statutory provisions; and
(g) paragraphs 19, 20 and 21 together with the particulars thereof deal with the alleged negligence and breach of statutory duties on the part of the 3rd defendant. A question of law and interpretation of statutory provisions.

D. *The findings of the Court:*

From the above observations on the statement of claim it is in my judgment plain and obvious that paragraphs 4 to 15.1 should have been dealt with before the Special Commissioner as provided under the 1976 Act and the Income Tax Act 1967 (hereinafter called "the 1967 Act"). I agree with the learned Senior Federal Counsel that for those paragraphs this Court has no jurisdiction to entertain them. His Lordship Chang Min Tat FJ in *Arumugam Pillai v. Government of Malaysia* [1980] 2 MLJ 283 at p. 287 H (left) said this:

> Just as their Lordships did, we must not allow our vision to be obscured by "the cloud of words" and fail to see that the relief claimed in this action, more clearly than in the Indian action, is, in substance, for the modification, if not, the cancellation of the assessment made under the Ordinance and the Act.

Further, the issue raised in those paragraphs is already a subject of a Court judgment and pending appeal. Accordingly I am of the view that the plea of *res judicata* also succeeds. [See: *Othman & Anor. v. Mek* [1971] 2 MLJ 214].

But for paragraphs 15.2 to 21 it is my view that they involve interpretation of statutory provisions, questions of law and plain claims for fraud and negligence. I do not think these issues are directly, plainly and obviously connected to the question of being dissatisfied with the assessment of the gains tax. As such I think this Court has jurisdiction to determine those issues. Guidance may be sought for the present case from the case of *Lian Ann Lorry Transport & Forwarding Sdn. Bhd. v. Govindasamy* [1982] 2 MLJ 232, where the issue before the then Federal Court was on the interpretation of s. 31 of the Employees' Social Security Act 1969. It was submitted by the learned Counsel for the appellant in that case that the question as to whether the respondent was an employee within the meaning of the Act ought to be decided by the Social Security Appellate Board and not by a Civil Court. His Lordship Salleh Abas FJ (as he then was) at p. 236 F (right) to I (right) said this:

> The effect of the appellant's contention on the second ground of appeal, therefore, is that neither the learned trial Judge nor we

have the jurisdiction to determine in this appeal the question as to whether the respondent was an employee or not; and that only after the Board has so determined it would the learned trial Judge and we either by way of a submission by the Board or by way of an appeal have the necessary jurisdiction to decide the question and that even here we are limited to decide only upon matters involving a substantial question of law. If this submission is right it means that the learned trial Judge should not have decided the question as to whether or not the respondent was an employee at all. Yet the decision on this issue is crucial to the Court's determination on the applicability or otherwise of s. 31 of the Act which is part of the appellant's case. Does it mean that the Court has also no jurisdiction to decide on the interpretation of this section? Or does it mean that the Court, when confronted by the question during the course of determining the applicability or otherwise of s. 31 of the Act, must adjourn the hearing and refer the question to the Board?

His Lordship continued at p. 237 B (right) to say this:

> Quite apart from this technical objection, Counsel's submission is also untenable because the issue which the learned trial Judge was called upon to decide is really on the interpretation of s. 31 of the Act and not on the question of the respondent being an employee within the meaning of the Act, although such question is crucial to the main issue. Section 84 of the Act does not enact that the applicability or otherwise of s. 31 lies with the Board. Indeed it will be unconstitutional as it is contrary to Article 121 of the Federal Constitution if the Act were to arrogate the interpretation of this section to the Board. The determination of a preliminary question as to whether or not the respondent was an employee is not only plainly a legal question but also an integral part of the interpretation of s. 31 which is legally and constitutionally not within the competence of the Board to decide.

Similarly in the present case I find no provision in the 1976 Act or in the 1967 Act which deprives the civil Court of jurisdiction when the question of statutory interpretation or plain question of law arises. Indeed s. 102(9) of the 1967 Act provides "appeal" to mean only an appeal against an assessment.

I am also fortified in my view by *Arumugam Pillai's* case *(supra)* where Chang Min Tat FJ at p. 288 H (left) said this:

> ... we therefore take the view that the cause of action is one seeking to have the particular statutory provision in the federal law relating to taxation determined by the Court. Perhaps in such a circumstance, resort should have been had on O. 25 r. 2, Rules of the Supreme Court 1957, an objection taken on the pleadings and the point set down for argument.

It is a settled law that 'the inherent power to dismiss an action summarily without permitting the plaintiff to proceed to trial is a drastic power. It should be exercised with the utmost caution': per Seah FJ at p. 350 I (left) in the case of *C.C. Ng & Bros. Sdn. Bhd. v. Government of State of Pahang* [1985] 1 MLJ 347. It has also been held that 'it is no part of the Court's function at this stage of the litigation to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial': per Raja Azlan Shah Ag. CJ (Malaya) (as he then was) in *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979]1 MLJ 23 at p. 23 G (right). Again in the case of *Lee Nyan Choi v. Voon Noon* [1979] 2 MLJ 28, His Lordship Lee Hun Hoe CJ (Borneo) said this at p. 29 C (right):

> As there are triable issues the proper course would be for the issues to be tried in the usual manner in open Court. The power to dismiss an action summarily without permitting a party to proceed to trial is a drastic power and should be exercised with utmost caution. The power of summary procedure should only be resorted to in plain and obvious cases.

Accordingly in the present case the issues raised in paragraphs 15.2 to 21 of the statement of claim, in my view, are triable issues and not obviously unsustainable. A full hearing is therefore necessary before this Court can determine on the scope of the statutory and constitutional provisions raised in the statement of claim. I am unable therefore to agree with the contention of the defendants that there is no reasonable cause of action disclosed, that the action is frivolous and vexatious and an abuse of the process of the Court. In *Drummond-Jackson v. British*

Medical Association [1970] 1 All ER 1094 Lord Pearson at p. 1101 said this:

> A reasonable cause of action means a cause of action with some chance of success, when only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out.

I have examined the statement of claim in the present case and I have given my views as above.

Incidently I note that the prayers of this action appear to me to be substantially within the ambit of paragraphs 15.2 to 21 of the statement of claim.

E. *Conclusions:*

In view of my findings herein above I hereby order that only paragraphs 4 to 15.1 of the statement of claim be struck out. I leave it to the plaintiff to apply for the necessary amendments to the remaining paragraphs of the statement of claim in view of my preceding order. Since the defendants are only partially successful I order that only one-half of the taxed costs be awarded to them in the exercise of my discretion.

Reported by Shamsiah Begum Subhan.

TEO SIAW PENG

v.

PUBLIC PROSECUTOR

HIGH COURT, KUCHING
TUAN RICHARD MALANJUM JC
[CRIMINAL APPEAL NO. KG. 33 OF 1992]
14 APRIL 1993

CRIMINAL LAW: Possession of offensive weapon - Finding of fact - Appeal - Caution statement - Admissibility - First information report - Section 6(1) Corrosive and Explosive Substances and Offensive Weapons Act 1958 - Whether imprisonment sentence mandatory.

On 10 May 1988 at about 8 p.m. the appellant opened the door of the Romantic Karaoke, holding an offensive weapon, to wit a parang or a long knife similar to a samurai sword. PW1 was standing about 10 feet away and the light at the door was bright thus enabling him to see the weapon carried by the appellant.

The learned Magistrate convicted and sentenced the appellant to 5 months imprisonment. The appellant appealed against conviction and sentence.

Held:

[1] An appellate court in the interest of justice can intervene on the findings of fact by a trial court if the findings of the trial court are against the weight of evidence or that the inference drawn could not find support from the primary facts as found.

[2] It can be inferred that the alleged assault by PW6 on the appellant the day before could not have caused any effect on the mental condition of the appellant so as to have made him feel threatened, induced or promised before giving his cautioned statement.

[3] It is settled law that a first information report is not substantive evidence to prove a fact. At most it is of corroborative value. Further, in the present case the first information report was tendered yet no cross-examination of PW1 on the first information report was made by the defence Counsel. No adverse inference should therefore be invoked.